

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GRAND RIVER ENTERPRISES SIX :
NATIONS, LTD., :
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Plaintiff, :
 :
-against- : **MEMORANDUM OPINION**
 : **AND ORDER**
 : 02 Civ. 5068 (JFK)
TROY KING, et al., :
 :
Defendants. :
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JOHN F. KEENAN, United States District Judge:

Before the Court is Plaintiff's objection to Magistrate Judge Douglas F. Eaton's April 18, 2008, Discovery Order. Plaintiff argues that Magistrate Judge Eaton erred in finding certain documents privileged since (1) Defendants waived the right to assert privilege by producing privilege logs in an untimely fashion and which were allegedly substantively deficient and (2) the documents are not in fact privileged. Magistrate Judge Eaton's Order did not specifically consider whether Defendants waived privilege by producing privilege logs in an untimely fashion or which were deficient. The Court remands this single issue.

Discovery issues, including questions of privilege, are generally considered non-dispositive. See Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990); Eisai

Ltd. v. Dr. Reddy's Labs., Inc., 406 F. Supp. 2d 341, 342 (S.D.N.Y. 2005). When a party files an objection to a magistrate judge's order on a non-dispositive matter, the district judge to whom the case is assigned must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

Failure to timely provide a privilege log may result in a waiver, Rahman v. Smith & Wollensky Rest. Group, Inc., No. 06 Civ. 6198, 2007 U.S. Dist. LEXIS 37642, at *7 (S.D.N.Y. May 24, 2007) (collecting cases); however, "[o]nly 'flagrant' violations" require such an outcome. Pem-America, Inc. v. Sunham Home Fashions, No. 03 Civ. 1377, 2007 U.S. Dist. LEXIS 80548, at *5 (S.D.N.Y. Oct. 30, 2007).

"While failure to properly identify privileged documents in a privilege log can lead to waiver of the privilege, usually the attorney-client privilege is only waived when the party either failed to give any clear indication that the documents were privileged, or provided an inadequate privilege log where documents were not properly specified." Id. at *4.


The Court cannot determine whether Magistrate Judge Eaton's April 18, 2008, Order was clearly erroneous or contrary to law until the Court is able to review the

magistrate judge's reasons for disregarding Plaintiff's waiver claim. Magistrate Judge Eaton should consider whether Defendants' privilege logs were untimely or substantively deficient and, if so, whether this waived privilege. This issue is remanded.

Because the waiver question potentially renders moot the rest of Magistrate Judge Eaton's Order, the Court refrains from addressing the Order's other holding.

SO ORDERED.

Dated: New York, New York
October 14, 2008



JOHN F. KEENAN
United States District Judge